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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

HOWARD FINN, M.D. et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA ANESTHESIA
MEDICAL CONSULTANTS,
INC. et al.,

Defendants and Respondents.

B296772

(Los Angeles County
Super. Ct. No. BC653241)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Reversed.

Matthew E. Hess for Plaintiffs and Appellants.

Leech Tishman Fuscaldo & Lampl and Christopher Gonzalez, Naomi Gemmell for Defendants and Respondents
California Anesthesia Medical Consultants, Inc. and Carlos Rico, M.D.

Howard Finn, M.D., Douglas Thom, M.D., and Ricky Lee Sedgwick, D.O. appeal from a judgment of dismissal entered as to defendant Carlos Rico, M.D. after the trial court sustained without leave to amend a demurrer filed by Rico and California Anesthesia Medical Consultants, Inc. (CAMC) to plaintiffs' third amended complaint. Plaintiffs sued CAMC and Rico, who was CAMC's only shareholder and director, for failure to compensate plaintiffs for anesthesiology services they provided pursuant to a written services agreement. Plaintiffs also alleged Rico and CAMC transferred to Rico all but \$800 of the funds in CAMC's bank accounts to avoid paying plaintiffs, in violation of the Uniform Voidable Transactions Act, Civil Code, section 3439 et seq. (UVTA).¹ On appeal, plaintiffs contend the trial court erred in sustaining without leave to amend Rico's demurrers to their claims for violation of the UVTA (in the third amended complaint) and for conversion (in the second amended complaint). We agree the trial court erred in sustaining the demurrer to plaintiffs' UVTA claim, but it properly sustained the demurrer to plaintiffs' conversion claim. We reverse the entry of judgment and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

A. Background Facts²

Plaintiffs worked for CAMC as anesthesiologists pursuant to a written services agreement. CAMC was the exclusive

¹ All further undesignated statutory references are to the Civil Code.

² The facts are taken from the operative third amended complaint.

provider of anesthesiology services for Glendale Memorial Hospital. Abeo Medical Management, Inc., was responsible for billing and collecting payments on behalf of CAMC. However, because it took several months to collect payment, plaintiffs were often paid four to seven months after services were provided.

In December 2016 Glendale Memorial ended its relationship with CAMC. As of that date plaintiffs had not yet been paid for the work they had performed in October, November, and December 2016, and they had only received partial payments for the prior three months. Abeo continued to collect payments from insurance companies and deposited the funds in CAMC's bank account or in a trust account for the benefit of CAMC. On February 8, 2017 Abeo advised Rico of the amount it was going to pay plaintiffs on the usual pay date, February 15. However, Rico instructed Abeo not to make any more payments on the false premise that the written services agreement stated plaintiffs were not entitled to additional compensation upon termination of the contract with Glendale Memorial. Rico also instructed Abeo not to disclose the amounts due to plaintiffs. At some point after February 16, 2017 "Rico emptied CAMC's bank accounts, by check or by wire transfer even [though] Rico had been advised by Abeo that the funds deposited [in] those accounts were due to [p]laintiffs." Rico left only \$800 in the CAMC bank accounts although CAMC owed plaintiffs approximately \$300,000.

B. *Procedural History*

Plaintiffs filed this action against CAMC and Rico on March 10, 2017. After the trial court sustained CAMC and Rico's demurrer to the first amended complaint with leave to amend, Plaintiffs filed a second amended complaint alleging causes of action against Rico and CAMC for breach of contract, money had

and received, accounting, breach of fiduciary duty, fraud, conversion, and violation of the UVTA. Plaintiffs also alleged Rico was the alter ego of CAMC, stating Rico was the sole shareholder, director, and officer of CAMC; CAMC failed to observe corporate formalities; Rico “dominated and controlled CAMC”; CAMC was inadequately capitalized; CAMC had no employees or assets; and adhering to the fiction of CAMC’s corporate existence would be unjust and sanction a fraud.

Rico and CAMC again demurred, and the trial court sustained the demurrer without leave to amend as to all causes of action against Rico and as to the claims against CAMC for an accounting, breach of fiduciary duty, fraud, and conversion. The trial court overruled the demurrer to the causes of action against CAMC for breach of contract and money had and received. The court dismissed the UVTA cause of action because plaintiffs had included it in the second amended complaint without obtaining leave of court. However, the court subsequently granted plaintiffs’ motion for leave to file a third amended complaint with a cause of action for violation of the UVTA. The third amended complaint alleged causes of action against CAMC for breach of contract and money had and received and against CAMC and Rico for violation of the UVTA.

Rico again demurred to the UVTA cause of action.³ On November 19, 2018 the trial court sustained the demurrer

³ As Rico points out, plaintiffs failed to include in their appellant’s appendix the demurrer to the second amended complaint, the opposition to the demurrer, the demurrer to the third amended complaint, and the reply brief in support of the demurrer. On our own motion we augment the record to include CAMC and Rico’s demurrer to the third amended complaint filed

without leave to amend and dismissed Rico from the action. The court entered a judgment of dismissal on February 22, 2019. Plaintiffs timely appealed from the judgment and the trial court's January 5, 2018 order sustaining Rico's demurrer to the second amended complaint.⁴

DISCUSSION

A. *Standard of Review*

"In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. [Citation.] Where the demurrer was sustained without leave to amend, we consider whether the plaintiff could cure the defect by an amendment." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162; accord, *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010.) When evaluating the complaint, "we assume the truth of the allegations." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1230; accord, *McCall v. PacifiCare of Cal., Inc.*

on October 25, 2018. (Cal. Rules of Court, rule 8.155(a)(1)(A).) Plaintiffs' failure to include the additional pleadings on the demurrers does not bar relief, as argued by Rico, because the documents are not required or necessary for our review. (See Cal. Rules of Court, rule 8.122(b)(1) [listing documents required to be included in clerk's transcript], rule 8.124(b)(3)(A) [appellant's appendix must include documents required by rule 8.122(b)(1) and those necessary for proper consideration of issues on appeal or which respondent might reasonably rely upon].)

⁴ After judgment was entered, plaintiffs entered into a tolling agreement with CAMC and dismissed the action against CAMC without prejudice.

(2001) 25 Cal.4th 412, 415.) “A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the court acted on that ground.” (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324; accord, *Summers v. Colette* (2019) 34 Cal.App.5th 361, 367.)

A trial court abuses its discretion by sustaining a demurrer without leave to amend where “there is a reasonable possibility that the defect can be cured by amendment.” (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100; accord, *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) “The plaintiff has the burden of proving that [an] amendment would cure the legal defect, and may [even] meet this burden [for the first time] on appeal.” (*Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19 Cal.App.5th 1127, 1132; accord, *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 971.)

B. A Reporter’s Transcript Is Not Necessary for Our Review

Rico contends plaintiffs’ failure to provide a reporter’s transcript of the hearings is fatal to plaintiffs’ appeal. It is not. A reporter’s transcript or settled statement is not necessary where an appeal involves only legal issues, we review de novo review. (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483.) Rico’s reliance on California Rules of Court, rule 8.486(B) is misplaced because the rule governs only writs of mandate, certiorari, and prohibition. His citation to an unpublished opinion included in respondent’s appendix of exhibits is improper. (Cal. Rules of Court, rule 8.1115(a); *People v. Gray* (2014) 229 Cal.App.4th 285, 292, fn. 15 [“It is improper to cite or rely upon unpublished opinions.”].) Although a transcript

of the trial court proceedings would shed light on whether plaintiffs made an offer of proof to amend the complaint at the hearing, that showing is not necessary because we may grant leave to amend on appeal. (*Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1044 [lack of reporter’s transcript not a bar to relief, explaining plaintiff “having requested an opportunity to amend in the trial court is not a condition precedent to our now granting such relief.”]; see *Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority*, *supra*, 19 Cal.App.5th at p. 1132.)

C. *The Trial Court Erred in Sustaining Rico’s Demurrer to the UVTA Claim*

1. *The UVTA*

The UVTA, formerly known as the Uniform Fraudulent Transfer Act (see Stats. 2015, ch. 44, § 2, p. 1456 (Sen. Bill No. 161 (2015–2016 Reg. Sess))), “permits defrauded creditors to reach property in the hands of a transferee.” (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663; accord, *Potter v. Alliance United Ins. Co.* (2019) 37 Cal.App.5th 894, 910 (*Potter*) [“The UVTA permits a creditor to recover against a transferee or a “person for whose benefit the transfer was made”]; see § 3439.08, subd. (b)(1) [creditor may recover judgment against the “first transferee of the asset” or “immediate or mediate transferee of the first transferee”].)

“A creditor may set aside a transfer as fraudulent under Civil Code section 3439.04 by showing actual fraud as defined in subdivision (a)(1) or by showing constructive fraud as defined in subdivision (a)(2)” (*Chen v. Berenjian* (2019) 33 Cal.App.5th 811, 817; accord, *Potter*, *supra*, 37 Cal.App.5th at pp. 903-904; *Lo v.*

Lee (2018) 24 Cal.App.5th 1065, 1071.) Under section 3439.04, subdivision (a)(1), actual fraud is shown where the debtor made the transfer with “actual intent to hinder, delay, or defraud any creditor of the debtor.” There are two forms of constructive fraud. (*Mejia v. Reed, supra*, 31 Cal.4th at p. 669; *Potter*, at p. 904.)

First, constructive fraud is shown where a debtor makes a transfer “[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either: [¶] (A) [w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction[; or] [¶] (B) [i]ntended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor’s ability to pay as they became due.” (§ 3439.04, subd. (a)(2).)

Second, constructive fraud is shown where a transfer is made “without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.” (§ 3439.05, subd. (a).)

Section 3439.04, subdivision (b), lists factors (commonly called “badges of fraud”) that may be considered “[i]n determining actual intent.” (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 834 (*Filip*); *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1298.) These factors include, as relevant here, “(1) Whether the transfer . . . was to an insider. [¶] (2) Whether the debtor retained possession or control of the property transferred after the transfer. [¶] (3) Whether the transfer . . . was disclosed or concealed. [¶] . . . [¶] (5) Whether the transfer was of substantially all the debtor’s assets. [¶] . . . [¶] (7) Whether the debtor removed or concealed assets. [¶] (8)

Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred . . . [And] [¶] (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made” (§ 3439.04, subd. (b).)

2. Plaintiffs have alleged sufficient facts to state a claim under the UVTA

Plaintiffs contend they have alleged sufficient facts to state a claim for actual or constructive fraud under the UVTA.⁵ Plaintiffs are correct. As plaintiffs argue in their opening brief, they have alleged facts supporting a claim for constructive fraud under section 3439.04, subdivision (a)(2). The third amended complaint alleged “Rico emptied CAMC’s bank accounts, by check or by wire transfer even [after] Rico had been advised by Abeo that the funds deposited on those accounts were due to Plaintiffs.” Further, “CAMC did not receive a reasonably equivalent value in exchange for the transfer.” As to the element the debtor “[i]ntended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor’s ability to pay as they became due” (§ 3439.04, subd. (a)(2)(B)), plaintiffs alleged “CAMC transferred money to Rico in an effort to render itself judgment-proof and avoid its obligations

⁵ In his respondent’s brief, Rico addresses both actual and constructive fraud, but he correctly notes plaintiffs’ opening brief focuses only on the elements of a constructive fraud claim. In light of Rico’s discussion of actual and constructive fraud and plaintiffs’ discussion of actual and constructive fraud in their opposition to the demurrer filed in the trial court, we decline to find plaintiffs forfeited this argument. In any event, plaintiffs have alleged sufficient facts to support a claim under a theory of either actual or constructive fraud.

to [p]laintiffs[, and] Rico, as the President of CAMC, authorized and participated in this transfer”; CAMC had only \$800 left in its bank account after the transfer, although it owed plaintiffs approximately \$300,000; and “[a]s a result of the transfer, CAMC is unable to pay its obligations to [p]laintiffs.”

In his respondent’s brief Rico argues plaintiffs have not sufficiently alleged constructive fraud because the transferred funds were “not paid to Rico”; “were fully paid back” to CAMC; and were in exchange for an “equivalent value.” However, these facts are outside the four corners of the third amended complaint and are not properly considered on a demurrer. Rather, “[A] demurrer looks only to the face of the pleadings and to matters judicially noticeable and not to the evidence or other extrinsic matter.” (*Price v. Dames & Moore* (2001) 92 Cal.App.4th 355, 359; accord, *County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1008-1009 [“A demurrer is a pleading used to challenge the legal sufficiency of an opponent’s pleading based on defects that appear either on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable.”].)

Rico also contends plaintiffs have not alleged actual fraud because the third amended complaint only alleges two of the 11 badges of fraud listed in section 3439.04. However, “these factors do not create a mathematical formula to establish actual intent. There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other.” (*Filip, supra*, 129 Cal.App.4th 825, 834; accord, *Annod Corp. v. Hamilton & Samuels, supra*, 100 Cal.App.4th at pp. 1298-1299 [rejecting

argument certain number of “badges of fraud” show fraudulent intent under former § 3439.04].)

Further, plaintiffs have alleged a number of the factors supporting intent to defraud under section 3439.04, subdivision (b), including (1) the transfer was to an insider (Rico); (3) the transfer was concealed (Rico told Abeo not to pay plaintiffs from the CAMC account or inform them of the amount they were owed); (5) substantially all of CAMC’s assets were transferred (all but \$800); (8) the debtor did not receive equivalent value; and (9) the transfer rendered the debtor insolvent (by transferring almost all of CAMC’s assets without paying its debt to plaintiffs). Although Rico is correct plaintiffs alleged the transfer of funds was made before plaintiffs filed suit, this is only one of the 11 factors to be considered in determining actual fraud under section 3439.04, subdivision (b): “Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.” (§ 3439.04, subd. (b)(4).)

D. *The Second Amended Complaint Did Not Allege Facts Sufficient To Constitute a Cause of Action for Conversion*

Plaintiffs argue the trial court erred in sustaining the demurrer to the conversion cause of action in the second amended complaint without leave to amend because they alleged Abeo was prepared to pay plaintiffs for work performed under the written services agreement, but Rico instructed the company not to pay the money and instead withdrew all but \$800 from CAMC’s bank account so there no funds left to pay plaintiffs. Rico responds that under the Supreme Court’s decision in *Voris v. Lampert* (2019) 7 Cal.5th 1141, 1144 (*Voris*), a failure to pay wages (here,

payment for services) cannot support a conversion claim. Rico has the better argument.

“““Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff’s ownership or right to possession of the property; (2) the defendant’s conversion by a wrongful act or disposition of property rights; and (3) damages. . . .””” (Hodges v. County of Placer (2019) 41 Cal.App.5th 537, 551; accord, Voris, supra, 7 Cal.5th at p. 1150.) Generally, “[a] cause of action for conversion of money can be stated only where a defendant interferes with the plaintiff’s possessory interest in a specific, identifiable sum.” (Kim v. Westmoore Partners, Inc. (2011) 201 Cal.App.4th 277, 284; accord, Voris, at p. 1151.) In holding a failure to pay wages cannot support a conversion claim, the Voris court explained, “The employee’s claim is not that the employer has wrongfully exercised dominion over a specifically identifiable pot of money that already belongs to the employee—in other words, the sort of wrong that conversion is designed to remedy. Rather, the employee’s claim is that the employer failed to reach into its own funds to satisfy its debt.” (Voris, at pp. 1152-1153; see Kim, at p. 284 [“the simple failure to pay money owed does not constitute conversion”].)

The Supreme Court in Voris observed that recognizing a conversion claim for unpaid wages would largely duplicate the remedies already provided by the Labor Code and traditional contract principles, and “to that extent [it] would serve little purpose.” (Voris, supra, 7 Cal.5th at p. 1158.) Plaintiffs seek to distinguish Voris on the basis they are independent contractors, and therefore they are unable to take advantage of the employee protections set forth in the Labor Code. However, the Voris court

based its holding on the fact the plaintiff had not alleged the employer interfered with his “possessory interest in a specific identifiable sum.” (*Id.* at p. 1151 [italics omitted].) As the court observed, “Were it otherwise, the tort of conversion would swallow the significant category of contract claims that are based on the failure to satisfy “mere contractual right[s] of payment.”” (*Ibid.*) The Supreme Court also noted it was a fiction that once services are performed, “certain identifiable monies in his employers’ accounts became [plaintiff’s] personal property.” (*Id.* at p. 1153.) Rather, “a claim for unpaid wages resembles other actions for a particular amount of money owed in exchange for contractual performance—a type of claim that has long been understood to sound in contract, rather than as the tort of conversion.” (*Id.* at p. 1156.) The *Voris* court distinguished cases where a defendant had failed to turn over commissions to the plaintiff, reasoning in those cases the funds were earmarked for a specific person. (*Ibid.*) Although plaintiffs allege Abeo was prepared to pay into the CAMC account funds to pay the plaintiffs for their services, the payments were more akin to wages than commissions in that they were calculated pursuant to a formula in the services agreement, not as a specified percentage of sales.⁶

⁶ Plaintiffs also contend the trial court erred in sustaining Rico’s demurrer to the “cause of action for alter-ego liability” in the third amended complaint. However, “[a] claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, . . . but rather, procedural, i.e., to disregard the corporate entity as a distinct defendant and to hold the alter ego individuals liable on the obligations of the corporation where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice.” (*Hennessey’s*

DISPOSITION

The judgment is reversed. The trial court is directed on remand to vacate the order as to Rico sustaining defendants' demurrer as to the third cause of action in the third amended complaint for violation of the UVTA and to enter an order overruling the demurrer as to the third cause of action. We affirm the trial court's order as to Rico sustaining defendants' demurrer to the sixth cause of action in the second amended complaint for conversion. The parties are to bear their own costs on appeal.

FEUER, J.

We concur:

PERLUSS, P. J.

SEGAL, J.

Tavern, Inc. v. American Air Filter Co. (1988) 204 Cal.App.3d 1351, 1359.) Plaintiffs do not argue any other causes of action alleged in the second amended complaint (for example, breach of contract or money had and received) should have survived the demurrer based on an alter ego theory. They have therefore forfeited any argument the trial court erred in dismissing these claims. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 ["Plaintiff has not raised this issue on appeal, however, and it may therefore be deemed waived."]; *Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19 Cal.App.5th 1127, 1136 [appellant forfeited challenge to issue not raised on appeal].)